Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–21–266 OF 2003
ABDUL MALIK ISHAK J
5 JANUARY 2007

Civil Procedure — Striking out — Statement of claim — Plaintiff sought to declare his 'demotion' from the rank of deputy superintendent of police to the rank of assistant superintendent of police and the disciplinary action against him as null and void — Application to strike out plaintiff's writ of summons and statement of claim — Whether acts of defendants a management prerogative and as such a non-justifiable issue

Evidence — Affidavit — Admissibility of — Whether averments contained in the affidavits are hearsay statements

The plaintiff was, at the material time, working with the Royal Malaysia Police Force and held the rank of assistant superintendent of police ('ASP'). He was later transferred to Taiping, Perak and given an acting rank of deputy superintendent of police ('DSP'). On 7 January 2002, a disciplinary letter was issued against the plaintiff and after having answered the disciplinary letter, the plaintiff was informed that he was found guilty for both the charges as alluded to in the disciplinary letter and he was sentenced to a fine of two days pay and given a warning. Dissatisfied with his transfer to Kota Kinabalu, Sabah and the 'demotion' in rank, the plaintiff brought an action against the defendants seeking, inter alia,that the 'demotion' from the rank of deputy superintendent of police (DSP) to the rank of assistant superintendent of police (ASP) and the disciplinary action against him was null and void. The defendants applied under O 18 r 19(1)(b) or (1)(d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of this court to strike out the plaintiff's writ of summons and the statement of claim. The plaintiff took the position that the affidavit ought to be rejected by this court because the averments contained therein were hearsay statements as the deponent Allaudeen was not a party to this action and that he was relying on matters that were not within his personal knowledge but rather on documents of other persons.

Held, striking out plaintiff's writ of summons and statement of claim with costs:

(1) Allaudeen was a police officer and he had access to all the records of service of police personnel maintained by the defendants. The source of the information was clearly stated and exhibited in Allaudeen's affidavit. There was also no presumption of facts or extrinsic evidence incorporated in Allaudeen's affidavit (see paras 16, 18).

(2) Even though the plaintiff was acting on the rank of Deputy Superintendent of Police ('DSP'), that did not mean that he was guaranteed a confirmation or promotion to that rank. The plaintiff was only an officer who may be 'fit to be chosen' and not 'entitled' to be confirmed or promoted. The plaintiff, who was on an acting rank of DSP cannot convince this court that he should be promoted to the rank of DSP. It was the management prerogative of the defendants to decide whether to confirm him on the rank of DSP or otherwise (see paras 25, 28).

[Bahasa Malaysia summary

Plaintif adalah pada kesemua masa yang material, bekerja dengan Angkatan Polis Diraja Malaysia dengan pangkat penolong penguasa polis ('PPP'). Beliau kemudiannya ditukar ke Taiping, Perak dan diberikan pangkat pemangku timbalan penguasa polis ('TPP'). Pada 7 Januari 2002, satu surat disiplin dikeluarkan terhadap plaintif dan selepas menjawab surat disiplin tersebut, plaintif dimaklumkan bahawa beliau didapati bersalah atas kedua-dua caj-caj yang dinyatakan di dalam surat disiplin tersebut dan beliau dihukum denda dua hari gaji dan diberi amaran. Tidak puas hati dengan pertukarannya ke Kota Kinabalu, Sabah dan 'turun pangkat' beliau, plaintif mengambil tindakan terhadap defendan-defendan menuntut, antara lain, bahawa 'turun pangkat' beliau dari pangkat timbalan penguasa polis ke penolong penguasa polis dan tindakan disiplin terhadapnya adalah terbatal dan tidak sah. Defendan-defendan memohon di bawah A 18 k 19(1)(b) atau (1)(d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah bidang kuasa sedia ada mahkamah untuk membatalkan writ saman dan pernyataan tuntutan plaintif. Plaintif mengambil pandangan bahawa afidavit sepatutnya ditolak oleh mahkamah oleh kerana pernyataan-pernyataan yang terkandung di situ adalah keterangan dengar cakap oleh kerana deponen Allaudeen bukanlah seorang pihak kepada tindakan ini dan beliau hanya bergantung kepada perkara-perkara yang bukan dalam pengetahuan peribadinya tetapi atas dokumen-dokumen orang lain.

Diputuskan, membatalkan writ saman dan penyataan tuntutan plaintif dengan kos:

(1) Allaudeen adalah seorang pegawai polis dan beliau mempunyai akses kepada kesemua rekod-rekod perkhidmatan pegawai-pegawai polis yang disimpan oleh defendan-defendan. Sumber maklumat tersebut adalah jelas dinyatakan dan diekshibitkan di dalam afidavit Allaudeen. Afidavit Allaudeen juga tidak mengandungi anggapan fakta-fakta ataupun keterangan luar (lihat perenggan 16, 18).

(2) Walaupun plaintif memegang pangkat pemangku TPP, itu tidak bermaksud bahawa pengesahannya dijamin ataupun beliau akan dinaikkan pangkat. Plaintif hanyalah seorang pegawai yang berkemungkinan 'sesuai untuk dipilih' dan bukannya 'berhak' untuk disahkan atau dinaikkan pangkat. Plaintif, yang memegang pangkat pemangku TPP tidak dapat meyakinkan mahkamah ini bahawa beliau seharusnya dinaikkan ke pangkat TPP. Ia merupakan hak pengurusan defendan-defendan dalam menentukan sama ada untuk mengesahkan beliau di pangkat TPP atau sebaliknya (lihat perenggan 25, 28).]

Notes

For cases on admissibility of affidavits, see 7(1) *Mallals Digest* (4th Ed, 2006 Reissue) paras 235–240.

For cases on striking out of statement of claims, see 2 *Mallals Digest* (Consolidated Subject Index) paras 5959–5986.

Cases referred to

Akitek Bersatu v Sempurna Cekap Sdn Bhd [2004] 7 MLJ 45 (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

Anderson v Stather (1845) 9 Jur 1085 (refd)

Ang Siok Hong v Tan Geok Kwi [1998] 7 MLJ 251 (refd)

Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55 (refd)

Barnato, Re [1949) Ch 258 (refd)

Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kiam & Anor [2000] 4 AMR 4853 (refd)

Chan Kwai Chun v Lembaga Kelayakan [2002] 5 MLJ 273 (refd)

Chan Min Swee v Melawangi Sdn Bhd [2000] 7 MLJ 111 (refd)

Che Wan Development Sdn Bhd v Cooperative Central Bank Bhd [1989] 3 MLJ 40 (refd)

Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui [1978] 2 MLJ 24 (refd)

Connelly v DPP [1964] AC 1254 (refd)

DP Vijandran v Karpal Singh [1992] 1 CLJ 119 (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298 (refd)

Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia & Anor [1979] 2 MLJ 101 (refd)

Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor [1998] 5 MLJ 209 (refd)

Gleeson v J Wippell & Co Ltd [1977] 1 WLR 510 (refd)

Harrison v Croydon London Borough Council [1968] Ch 479 (refd)

Heymann; Ex p (1872) L R 7 Ch 488 (refd)

Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 (refd)

Khaw Kok Sin & Anor v Khaw Gim Leong Co Sdn Bhd & Ors [1974] 1 MLJ 180 (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789 (refd)

Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors [2004] 3 MLJ 339 (refd)

Lim Seak Huat v Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 (refd)

MBF Finance Bhd v Sri-Hartamas Development Sdn Bhd [1992] 1 CLJ 160 (refd)

MUI Bank Bhd v Alkner Investments Ptd Ltd [1990] 3 MLJ 385 (refd)

Malone v Metropolitan Police Commissioner [1979] Ch 344 (refd)

Nationwide Building Society v Bateman [1978] 1 All ER 999 (refd)

Nixon v AG [1930] 1 Ch 566 (refd)

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68 (refd)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
Petaling Tin Bhd v Lee Kian Chan [1994] 1 MLJ 657 (refd)
R v Jefferies [1968] 3 WLR 830; [1968] 3 All ER 238 (refd)
Rasiah Munusamy v Public Services Commission [1967] AC 348 (refd)
Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor [2000] 1 MLJ 107 (refd)
Rossage v Rossage & Ors [1960] 1 All ER 600 (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd (In dissolution) & Ors [1998] 1 MLJ 323 (refd)
Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86 (refd)
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (refd)
Sweney v The Department of Highways (1933) OWN 783 (refd)

Legislation referred to

Federal Constitution art 135(2)
Public Service Tribunal (Dissolution) Act 2000 (Act 604)
Public Service Tribunal Act 1977 s 13(g)
Public Services Promotion Board Regulations 1986 reg 2, 9, 12, 14, 15, 19, 22
Rules of the High Court 1980 O 15 r 16, O 18 r 19(1)(b), (1)(d), O 33 r 2, O 92 r 4
Rules of the Supreme Court 1970 r 5(2)
Specific Relief Act 1950 s 41

Manoharan Malayalam (M Manoharan & Co) for the plaintiff.
Munahyza bte Mustafa (Attorney General's Chambers) for the defendants.

Abdul Malik Ishak J:

ENCLOSURE 27

[1] It is an application by the defendants under O 18 r 19(1)(b) or (1)(d) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of this court to strike out the plaintiff's writ of summons and the statement of claim on the following grounds:

(i) that it is scandalous, frivolous or vexatious (under r 19(1)(b)); or

(ii) that it is otherwise an abuse of the process of the court (under r 19(1)(d)).

[2] The application in encl 27 is supported by an affidavit affirmed by Probationary ASP (1/10579) Allaudeen bin Abd Majid ('Allaudeen') on 17 March 2005 as seen in encl 25. The plaintiff himself affirmed an affidavit in reply in encls 23 on 12 April 2005 opposing the application.

[3] The grounds in support of the application are briefly set out in encl 27 and they may be stated as follows:

(a) that the transfer of the plaintiff from Taiping, Perak to Kota Kinabalu, Sabah is a management prerogative of the defendants;

(b) that the confirmation to the rank of Deputy Superintendent of Police (DSP) of which the plaintiff is acting constitutes a management prerogative of the defendants; and

(c) that such management prerogative of the defendants is a non-justifiable issue.

[4] The application in encl 27 is a summary procedure adopted by the defendants to put an end to the plaintiff's claim which on the face of it is obviously unsustainable. It is a common application and it is heard on a daily basis. The law on this point is quite settled. According to *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558, the root word to hold onto is not 'unsustainable' but rather on the word 'obviously' — which means that on the fact of it, the plaintiff's claim must be plainly or evidently unsustainable in law. So the plaintiff here must show that the pleadings do disclose some cause of action or has raised some question fit to be decided so that the case can be set down by this court expeditiously for argument as required under O 33 r 2 of the RHC (see *Saripah bte Manap & Ors v Emar Sdn Bhd (In dissolution) & Ors* [1998] 1 MLJ 323).

[5] It must be borne in mind that the court is empowered to make an order striking out any pleading or indorsement or anything found in it at any stage of the proceedings. Any applicant under this rule is entitled to rely on any or all of the grounds specified therein. It is the law that under this rule an applicant is free to rely on any or all of the grounds specified thereunder. It is now ideal to reproduce O 18 r 19 of the RHC. I shall do so now.

19 Striking out pleadings and indorsements (O 18 r 19)

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may be prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under para (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

It is crystal clear that under r 19(2), no evidence is admissible if the applicant grounds his application under para (1)(a). Here, the defendants in encl 27 rely on paras (1)(b) and (1)(d) of r 19 and affidavit evidence is certainly admissible.

[6] Jemuri Serjan CJ (Borneo) (as he then was) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 at p 258 (SC) held that the defendants there by filing an unconditional appearance had deprived themselves of the right to invoke O 18 r 19 of the RHC and I dutifully followed it in *Pet Far*

Eastern (M) Sdn Bhd v Tay Young Huat & Ors and in *Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kiam & Anor* [2000] 4 AMR 4853. I am concerned about the doctrine of precedent or of stare decisis. It means that the decision of the Supreme Court (now re-named as the Federal Court) acts as a binding authority on this court. Even the Court of Appeal is bound to follow the decision of our Federal Court. Glanville Williams in *Learning the Law* (9th Ed) (1973) at pp 67–68 explained it better in this way:

> What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.

There must be stability and certainly in the law. The notions of justice and fairness require that. WG Miller, *The Data of Jurisprudence* at p 335 aptly said and this should be the guiding principles to be adopted by the tribunal of facts:

> If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.

The Ontario Court of Appeal speaking through Middleton JA in *Sweney v The Department of Highways* (1933) OWN 783 (CA) made this observation:

> But, in my view, liberty to decide each can as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter, without any regard to previous decisions.

In short, decisions of eminent judges from the Federal Court must be religiously followed. And that any decision of the Federal Court can only be reviewed by another panel of the Federal Court.

[7] It is, with respect, wrong to say as was said in *Akitek Bersatu v Sempurna Cekap Sdn Bhd* [2004] 7 MLJ 45; [2004] 7 CLJ 217 at p 224 that I had resiled from the earlier position which I took in deciding *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* when I decided the case of *Chan Min Swee v Melawangi Sdn Bhd* [2000] 7 CLJ 1; [2000] 7 MLJ 111; [2000] 4 AMR 3855. The doctrine of stare decisis was foremost in my mind when I decided the case of Chan Min Swee (supra). This was what I said (see Chan Min Swee at pp 39–40 of the CLJ reporting, at pp 142–143 of the MLJ reporting and at pp 3898–3900 of the AMR reporting):

> The law may compendiously be stated in the following terms:
>
> (1) If a party is interested in striking out a writ on the ground that the writ or service is irregular or of want of jurisdiction, the party must enter a conditional appearance. If the party enters an unconditional appearance, the party is deemed to have waived any irregularity in the writ or service and is said to have submitted to the jurisdiction of the court because this is the main effect of entering an unconditional appearance.

(2) If a party is interested to strike out a writ and the statement of claim on other grounds, the party can enter an unconditional appearance because the effect of an unconditional appearance (be it for defective writ or for defective service thereof or for want of jurisdiction) will not be relevant to the main ground for the striking out application.

(3) All the cases and commentaries show that a party can apply to strike out right up to the close of the pleading stage.

(4) Factually speaking, the plaintiff knew, at all material times, that the defendant had entered an unconditional appearance. That unconditional appearance too had been served on the plaintiff. Thus, when the defendant filed encl 7 to strike out the plaintiff's claim, the plaintiff should have raised a preliminary objection that the unconditional appearance was an irregularity. The plaintiff simply did not raise that kind of preliminary objection but instead proceeded to file an affidavit in reply in encl 8 and went at great length in submitting before the SAR. The plaintiff only raised this technical point at this stage and, that being the case, the plaintiff must be construed to have waived the irregularity, if at all that irregularity existed. Peh Swee Chin FCJ in*Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 at p 480 had this to say:

> A person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived. See also *Rain v Stein* (1892) 1 QB 753 and *Boyle v Sacker* (1888) 39 Ch D 249. We are in entire agreement with the decision in Fry v Moore. The second defendant had asked for leave to file an appearance and to file a statement of defence, clearly indicating that he wanted to go into the fray in full swing and that the matter of irregular service was a matter of the past, no longer an issue.
>
> The same point was also ventilated in the case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715.
>
> CONCLUSION
>
> I must revert to the case of the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* where the English Court of Appeal was very magnanimous and stayed the action until the assignee was (made) a party to the action. I too must be magnanimous in the interest of justice.
>
> For the reasons adumbrated above, I allowed the appeal in encl 9 and varied the order of the SAR to this extent: the suit is stayed for a period of six months from today (23 May 2000) so as to allow the plaintiff to amend the action by including the assignee bank as a party to the action; failing which, the plaintiff's suit will be struck off. There be no order as to costs.
>
> *Appeal allowed, suit stayed for six months to allow the plaintiff to include the assignee bank as a party to the action.*

Chan Min Swee centred on the court in allowing the suit to be stayed for six months in order to allow the plaintiff there to include the assignee bank as a party to the action. In *Chan Min Swee*, I said, inter alia, that since both the assignor and the assignee have interests in the chose in action via the assignment, then unless both the parties were in court, the court would not be in a position to determine which party's rights have been breached — whether it was the assignor's or the assignee's or both the assignor's as well as the assignee's rights. I too said that without the assignee bank the court cannot decide on the issues and even if the court were to decide, it

cannot bind the party that was not in court. I also said that the prevailing authorities favoured both the assignor and the assignee bank to be made parties to the suit.

[8] I will now say something about the inherent jurisdiction of this court relied upon by the defendants in their application to strike out in encl 27 thereof. O 92 r 4 of the RHC talks about the inherent powers of the court and it is worded as follows:

> 4. Inherent powers of the Court (O 92 r 4)
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

The relevant and germane authorities to consider would be as follows. In *Connelly v DPP* [1964] AC 1254, Lord Morris had occasion to say about the powers of the court in these erudite terms:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 at p 147, Edgar Joseph Jr J (as he then was) in style said:

> … it is clear that the inherent jurisdiction of the court includes all the powers that are necessary to fulfill itself as a court of law; to uphold, to protect, and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

The inherent jurisdiction of the court is a power that is all encompassing. Under it the court has the resilient power to strike out an endorsement or pleading where it is plain and obvious that it is frivolous, vexatious and an abuse of the process of the court (see *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510).

[9] The inherent jurisdiction of the court has been invoked in a wide variety of circumstances and in an apparently inexhaustible ways and manners. The courts have invoked it in many instances (see *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui* [1978] 2 MLJ 24; *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; *Che Wan Development Sdn Bhd v Cooperative Central Bank Bhd* [1989] 3 MLJ 40; and *Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86; *Khaw Kok Sin & Anor v Khaw Gim Leong Co Sdn Bhd & Ors* [1974] 1 MLJ 180; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368; *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789; *MBF Finance Bhd v Sri-Hartamas Development Sdn Bhd* [1992] 1 CLJ 160 at pp 169–170; *DP Vijandran v Karpal Singh* [1992] 1 CLJ 119; and *Ang Siok Hong v Tan Geok Kwi* [1998] 7 MLJ 251). And the list is growing by the day. It is not capable of being exhaustively listed. It certainly has the capacity to diversify and it is very viable. It must be borne in mind that the court may exercise its inherent jurisdiction in respect of matters that are regulated by statute so long as it does not contravene any statutory provision. There is a difference between the inherent jurisdiction of the court and the statutory jurisdiction of the court.

The source of the statutory jurisdiction of the court lies in the statute itself whereas the source of the inherent jurisdiction of the court is derived from its very nature as a court of law. The inherent jurisdiction of the court is said to be procedural and not substantive. And it is applicable in both civil and criminal cases (see *Connelly v DPP* and *R v Jefferies* [1968] 3 WLR 830; [1968] 3 All ER 238).

[10] The inherent jurisdiction of the court is also exercisable by means of a summary process. Since it is part and parcel of the machinery of justice, any party may invoke the inherent jurisdiction of the court in pending proceedings. When one talks about 'summary process', one is referring to the exercise of the powers of the court to end the proceedings without a trial. This would mean that witnesses will not be called and be examined orally. However, it does not mean that the court can be capricious, arbitrary or irregular. Every party affected must be given an opportunity of being heard. It is because of this, that I am now hearing the submissions of counsel on both sides in regard to the defendants' application in encl 27. I am relying on the inherent jurisdiction of this court in order to hear encl 27.

THE FACTS OF THE CASE

[11] With all these legal semantics, I will now proceed to narrate the facts. The plaintiff was, at the material time, working with the Royal Malaysia Police Force and held the rank of Assistant Superintendent of Police (ASP). By a letter dated 21 January 1998, the plaintiff was transferred from Bukit Aman, Kuala Lumpur to the district police headquarters at Taiping, Perak and given an acting rank of Deputy Superintendent of Police ('DSP'). By a letter dated 29 September 2000, the plaintiff was transferred from Taiping, Perak to Kota Kinabalu, Sabah on his original rank as ASP. Dejected, the plaintiff appealed to the defendants but his appeal was rejected. By a letter dated 23 January 2001, the defendants ordered that the allowance for the acting rank of DSP which was previously received by the plaintiff to be discontinued with effect from 1 November 2000. On 7 January 2002, a disciplinary letter was issued against the plaintiff based on two reasons which happened during his service in Taiping, Perak. This very letter can be seen in exh 'AAM-8' annexed to the affidavit in encl 25 and it was worded in this way (in its original Malay text):

Ruj. Kami: (PR) G/11127

Tarikh: 7hb. Jan 2002

Asisten Superintenden Polis — G/11127

DOMNIC SELVAM A/L S GANAPRAGASAM

Melalui:

Komander Briged Sabah

Ibu Pejabat Briged Sabah

Pasukan Gerakan Am

Kota Kinabalu

SABAH

TINDAKAN TATATERTIB DI BAWAH PERATURAN

27, PERATURAN-PERATURAN PEGAWAI AWAM

(KELAKUAN DAN TATATERTIB) 1993

Bahawa satu laporan telah diterima oleh saya ((G/5189) TAN SRI NORIAN BIN MAI, KETUA POLIS NEGARA) selaku Pihak Berkuasa Tatatertib yang menyatakan bahawa anda telah melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap anda.

2. Pada menjalankan tugas-tugas yang telah diwakilkan kepada saya selaku Pihak Berkuasa Tatatertib oleh Suruhanjaya Pasukan Polis melalui PU (B) 441/2000 bertarikh 14 Disember 2000 saya selaku Pihak Berkuasa Tatatertib setelah menimbangkan laporan itu, telah mendapati bahawa anda patut dikenakan tindakan mengikut peraturan 27, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tetatertib) 1993 di atas alasan-alasan seperti yang tersebut di bawah ini:

2.1 Alasan Pertama

Bahawa anda sebagai Pegawai Awam iaitu Pemangku Deputi Superintenden Polis di dalam Pasukan Polis Di Raja Malaysia yang ketika itu bertugas sebagai Ketua Bahagian Siasatan Jenayah, IPD Larut Matang, Taiping, Perak antara 19 Mac 2000 hingga 18 Jun 2000 anda didapati telah menjalin perhubungan dengan TAN SOON WENG @ DAVID TAN (KP: 540606-07-5371) yang merupakan penganjur kegiatan mesin perjudian di daerah Taiping, Perak. Oleh hal yang demikian anda telah membiarkan kepentingan persendirian bercanggah dengan tugas awam hingga menjejaskan kegunaan anda sebagai Pegawai Awam sepertimana yang dinyatakan di bawah Peraturan 4(2)(c)(i) PPPA 1993 yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh;

(c) berkelakuan dengan apa-apa cara yang mungkin menyebabkan syak yang munasabah bahawa:-

(i) dia telah membiarkan kepentingan persendirian bercanggah dengan tugas awam hingga menjejaskan kegunaannya sebagai seorang pegawai awam.

2.2 Alasan Kedua

Bahawa anda sebagai Pegawai Awam iaitu Pemangku Deputi Superintenden Polis di dalam Pasukan Polis Diraja Malaysia yang ketika itu bertguas sebagai Ketua Bahagian Siasatan Jenayah, IPD Larut Matang, Taiping, Perak telah ingkar perintah kerana gagal membuat pengisytiharan harta dalam tempoh tiga bulan dari tarikh perolehan iaitu sebuah kereta Proton Iswara, nombor pendaftaran PCL 1964 yang dimiliki anda sejak bulan Mei 1997 hingga Mei 2001. Dengan itu anda telah melanggar kehendak para 8, Surat Pekeliling Perkhidmatan Bil 2 Tahun 1999. Oleh yang demikian anda telah melakukan kesalahan tatatertib di bawah peraturan 4(2)(i) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 yang berbunyi seperti berikut:-

4 (2) seseorang Pegawai Awam tidak boleh:

(i) ingkar perintah dan berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

3. Anda dikehendaki mengemukakan representasi bertulis kepada saya selaku Pihak Berkuasa Tatatertib melalui Ketua Jabatan dengan manyatakan alasan-alasan untuk membebaskan diri anda.

4. Representasi bertulis itu hendaklah diterima oleh saya di dalam tempoh tidak kurang daripada 21 hari mulai tarikh anda menerima surat ini.

5. Jika representasi bertulis tersebut tidak diterima oleh saya di dalam tempoh masa tersebut, saya selaku Pihak Berkuasa Tatatertib akan menimbang dan memutuskan hukuman ke atas anda berdasarkan fakta yang ada.

6. Sila akui penerimaan surat ini dengan menandatangani di ruangan yang telah disediakan.

Sgd: (Illegible)

(TAN SRI NORIAN BIN MAI) IGP

Pihak Berkuasa Tatatertib

Ibupejabat Polis

BUKIT AMAN.

It is quite obvious that the two reasons were in fact the two charges framed by the writer against the plaintiff. The plaintiff answered the disciplinary letter by way of his letter dated 18 March 2002 as seen in exh 'AAM-9' annexed to the affidavit in encl 25. And by way of a letter dated 11 June 2002 as seen in exh 'AAM-10' annexed to the affidavit in encl 25, the plaintiff was informed that he was found guilty for both the charges as alluded to in the disciplinary letter and he was sentenced to a fine of two days pay and given a warning. Dissatisfied with his transfer to Kota Kinabalu, Sabah and the so-called demotion in rank, the plaintiff brought this action against the defendants on 19 September 2003.

THE PLAINTIFF'S STATEMENT OF CLAIM

[12] The plaintiff seeks for the following declarations and orders from this court:

(a) a declaration that the 'demotion' in rank from the rank of Deputy Superintendent of Police ('DSP') to the rank of Assistant Superintendent of Police ('ASP') against him was null and void;

(b) a declaration that the disciplinary action taken against him was null and void;

(c) an order that the rank of DSP be reverted back to him with effect from 16 February 1998;

(d) an order that his name be properly inserted in the DSP seniority list;

(e) a declaration that the words 'DENGAN PANGKAT HAKIKI' in the letter of transfer dated 29 September 2000 are defamatory of him; and

(f) general and special damages, emoluments and costs.

[13] The basic feature of seeking a declaratory order is that it is a discretionary remedy. It features prominently in private law and it is useful in that it would settle disputes before the right is infringed (Woolf and Zamir, The Declaratory Judgment, 2nd edition). A declaratory judgment states the rights or the legal position of the parties as they stand without changing them in any way whatsoever It is quite common in this court to find applications for declaratory reliefs seeking, inter alia, the meaning of some provisions in the will, or whether a particular statute applies to

a particular case that is awaiting adjudication, or whether the contract has been duly performed by the applicant, etc. Litigants are conscious of the value of seeking for a declaration. It is a remedy that is applicable to a wide variety of cases. A declaration usually decides and clarifies a legal position that faces the party (*Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657 at p 673; *Datuk Syed Kechik bin Syed Mohamed v The Governments of Malaysia & Anor* [1979] 2 MLJ 101). Section 41 of the Specific Relief Act 1950 provides for a declaratory decree. It stipulates that any person who is entitled to any 'legal character', or to any 'right as to any property', may institute a suit against any person denying, or interested to deny, his title to the 'character' or 'right'. The phrase 'legal character' used in s 41 of the Specific Relief Act 1950 is a phrase that is all encompassing. It covers a wide range of situations particularly where the legal right of an individual is infringed by an illegal or ultra vires action of the administrative authority. Even the phrase 'right as to any property' found in s 41 of the Specific Relief Act 1950 is of significance. It does not mean that an individual has a right in the property. Being a discretionary remedy, the court has the final say. The court will not grant a declaration when there is an alternative remedy that is available.

[14] Order 15 r 16 of the RHC makes provision for the court to issue declarations. It stipulates as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

The courts have been wary. It will not grant declaratory reliefs to resolve matters which are not justiciable. In *Nixon v AG* [1930] 1 Ch 566, the court refused to grant a declaration to determine the civil servants' superannuation allowances. The court also refused declarations for those claims based upon the European Convention on Human Rights (*Malone v Metropolitan Police Commissioner* [1979] Ch 344 — in regard to telephone tapping). In short, declaratory reliefs would be refused to spectators, speculators and busybodies. Those who ask hypothetical questions too would not be entertained (see *Re Barnato* [1949) Ch 258 and *Harrison v Croydon London Borough Council* [1968] Ch 479).

THE DEFENDANTS' DEFENCE

[15] It is now opportune to examine the defendants' defence. Briefly, the defence may be stated as follows:

(a) At the material time, the plaintiff was not holding the rank of DSP but merely acting on such rank;

(b) that the confirmation or otherwise to the rank of DSP acted upon by the plaintiff is a management prerogative of the Appointment and Promotion Committee and it is not an absolute right of the plaintiff;

(c) that the transfer from the district police headquarters at Taiping, Perak to the 'Pasukan Gerak Am' at Kota Kinabalu, Sabah on his original rank of Assistant Superintendent of Police ('ASP') was valid and in accordance with the law since the plaintiff has not at any time been confirmed to the rank of DSP;

(d) the phrase 'DENGAN PANGKAT HAKIKI ASP' in the letter of transfer dated 29 September 2000 is not a defamatory statement but it only means that the plaintiff's rank is reverted back to his original rank as an ASP;

(e) the disciplinary action taken against the plaintiff and the penalties imposed upon the plaintiff were valid and in accordance with the law;

(f) even though the plaintiff was called for an interview for a promotion from the rank of ASP to the rank of DSP, he is not eligible for a promotion for a certain duration of time as determined by the Appointment and Promotion Committee because he was found guilty of two charges and was penalised with a disciplinary sentence; and

(g) there was no infringement of the plaintiff's constitutional rights and art 135(2) of the Federal Constitution is not applicable since the plaintiff has not been 'demoted' or 'dismissed'.

THE REPLIES TO THE PLAINTIFF'S AFFIDAVIT IN REPLY AS SEEN IN ENCL 23

[16] In encl 23 at para 4, the plaintiff avers that the evidence of Allaudeen in the affidavit in encl 25 is hearsay because Allaudeen is not related to the proceedings at all. The defendants, in rebuttal, submit that Allaudeen has access to all the records of the defendants and because of that he is qualified to affirm the affidavit in encl 25. All the records are self-explanatory and clear evidence as to what actually happened in the process of servicing the documents onto the plaintiff. The records exhibited in the affidavit in encl 25 comprised the following items:

(a) a letter dated 21 January 1998 signed by Datuk Mohd Jamil Johari who was the Pengarah Pengurusan at the Jabatan Pengurusan at Bukit Aman (exh 'AAM-1' of encl 25);

(b) a letter dated 25 March 1998 signed by Dato' Abdul Ghafar bin Abdul Karim on behalf of the Ketua Polis Perak (exh 'AAM-2' of encl 25);

(c) a letter dated 15 April 1998 signed by Sulaiman bin Haji Mohd Yusof on behalf of the Penolong Pengarah Pengurusan (Perjawatan) at Bukit Aman (exh 'AAM-3' of encl 25);

(d) a letter dated 29 September 2000 signed by Datuk Mohd Bakri bin Hj Osman who was the Pengarah Jabatan Pengurusan at Bukit Aman (exh 'AAM-4' of encl 25);

(e) borang utusan Polis dated 22 October 2000 signed by Mohamad bin Haji Abdullah on behalf of the Pengarah Jabatan Pengurusan at Bukit Aman (exh 'AAM-6' of encl 25);

(f) a letter dated 23 January 2001 signed by Mohamad bin Haji Abdullah on behalf of the Penolong Pengarah Pengurusan (Perjawatan) at Bukit Aman (exh 'AAM-7' of encl 25);

(g) a letter dated 7 January 2002 signed by Tan Sri Norian bin Mai, the former Inspector General of Police (exh 'AAM-8' of encl 25); and

(h) a letter dated 11 June 2002 signed by Kahar bin Kassim on behalf of the Inspector General of Police (exh 'AAM-10' of encl 25).

[17] All the documents exhibited in the affidavit in encl 25 showed a series of events in the plaintiff's service history. All the documents were signed and issued by different personnel at different places. Allaudeen is presently in charge and he has access to all the records of service of the plaintiff. Indeed Allaudeen is a qualified person to affirm and depose to all the facts in the affidavit in encl 25. No facts in this case are within the knowledge of any particular individual or officer. All the facts pertaining to the plaintiff's matter are documented and they are available as records kept by the defendants. Allaudeen, in my judgment, is a qualified person and he is the right person to affirm the affidavit in encl 25. Allaudeen has signed the affidavit in encl 25 (see *Anderson v Stather* (1845) 9 Jur 1085) before the Commissioner for Oaths (see *Ex p Heymann* (1872) L R 7 Ch 488) and that affidavit is certainly admissible in evidence.

[18] The plaintiff takes the position that the affidavit in encl 25 ought to be rejected by this court because the averments contained therein are hearsay statements. It is argued that Allaudeen is not a party to this action and that he is relying on matters that are not within his personal knowledge but rather on documents of other persons. It is further argued that the makers of the documents annexed to the affidavit in encl 25 ought to have affirmed affidavits on their own accord exhibiting those documents. So, the plaintiff submits that the documents are hearsay and inadmissible. It is misconceived on the part of the plaintiff to rely on the case of *Chan Kwai Chun v Lembaga Kelayakan* [2002] 5 MLJ 273 because the judgment did not indicate what actually were exhs 'D' and 'F' annexed to the affidavit of Dato' Abdul Wahab were. The judgment merely ruled that exhs 'D' and 'F' cannot be tendered through the affidavit of Dato' Abdul Wahab. Perhaps these two exhibits were not so relevant to the issues in question because counsel for the defendant relied on other documents to bolster up the defendant's case. Again, reliance by the plaintiff on the case of *Rossage v Rossage & Ors* [1960] 1 All ER 600 does not affect the outcome of this case in favour of the defendants. In *Rossage v Rossage*, certain affidavits were struck out because they were irrelevant to the matter. Hodson LJ in his judgment made this observation:

> It is quite clear that we cannot strike out matters in a pleading or an affidavit simply because they are scandalous, because scandalous matter may be relevant, and may be the very matters which have to be investigated by the court. If, however, the matters are plainly irrelevant, as they are here, there is no doubt that the court can strike them out, …..

Here, in the present case before me, all the documents that were exhibited and alluded to earlier are relevant to show the sequence of the plaintiff's service records. *Nationwide Building Society v Bateman* [1978] 1 All ER 999 can readily be distinguished. In that case the deponent of the affidavit on the building society's behalf stated: 'I am informed and verily believe that the defendant and his family are the only persons in occupation of the said premises'. It showed that the deponent had no knowledge as to who was actually in possession of the land in question. By comparison, in the present case before me, Allaudeen is a police officer and he has access to all the records of service of police personnel maintained by the defendants. The plaintiff further relies on the case of *MUI Bank Bhd v Alkner Investments Ptd Ltd*

[1990] 3 MLJ 385 where the learned Judicial Commissioner said at pp 387–388: 'Further, even assuming that r 5(2) of the Rules of the Supreme Court 1970 applies to the application there is a defect in the affidavits affirmed by Lam: he failed to identify the specific officers in ACB from whom he had obtained the information. So, strictly, this portion of the evidence should be disregarded'. Here, in sharp contrast, the affidavit affirmed by Allaudeen is not defective at all. Finally, the plaintiff relies on the case of *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303 where the second to the seventh respondents had not disclosed the source of the information, had presumed certain facts, had made a presumption on the other party's interest and had used extrinsic evidence. Here, the source of the information is clearly stated and exhibited in Allaudeen's affidavit in encl 25. There is also no presumption of facts or extrinsic evidence incorporated in Allaudeen's affidavit in encl 25.

[19] The plaintiff in his affidavit in reply in encl 23, particularly in paras 6, 7 and 8, denies having any knowledge in regard to the records of the defendants identified as exhs 'AAM-2', 'AAM-3' and 'AAM-7' annexed to Allaudeen's affidavit in encl 25. A perusal of these three exhibits would show that they are within the factual knowledge of the plaintiff. Allow me to elaborate further:

(a) Exhibit 'AAM-2' of encl 25, as I said, is a letter dated 25 March 1998 signed by Dato' Abdul Ghafar bin Abdul Karim on behalf of the Ketua Polis Perak and his letter certifies the fact that the plaintiff did present and report himself for duty at Taiping, Perak. I wonder whether the plaintiff is now contesting the fact that he has reported and served his duty at Taiping, Perak.

(b) Exhibit 'AAM-3' of encl 25, as I said, is a letter dated 15 April 1998 signed by Sulaiman bin Haji Mohd Yusof on behalf of the Penolong Pengarah Pengurusan (Perjawatan) at Bukit Aman defining the status of the plaintiff as an 'acting DSP'. The plaintiff avers that he has no knowledge of such a definition of the phrase 'acting DSP' or being informed of such a definition. The defendants aver that the definition or meaning of the status of 'acting rank of DSP' is a point of law or administrative law which the plaintiff ought to know. The defendants aver that ignorance of the law is not an excuse.

(c) Exhibit 'AAM-7' of encl 25, as I said, is a letter dated 23 January 2001 signed by Mohamad bin Haji Abdullah on behalf of the Penolong Pengarah Pengurusan (Perjawatan) at Bukit Aman and it is a letter directing to stop the payment of the acting allowance which was formerly given to the plaintiff. It is a consequential record after the plaintiff's 'acting rank of DSP' was reverted to his original rank of ASP. That fact was within the knowledge of the plaintiff since the plaintiff himself in his statement of claim claimed for such an allowance to be paid back to him.

INHERENT JURISDICTION OF THE COURT

[20] As I said earlier that the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* held, inter alia, that the filing of an unconditional appearance had deprived the defendants there of the right to invoke O 18 r 19 of the RHC. It was a mere obiter dicta. But based on the doctrine of stare

decisis, I followed it in *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* and also in *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 and also in *Chan Min Swee v Melawangi Sdn Bhd* and, finally, in *Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kiam & Anor*. Unfortunately, there is no current Court of Appeal decision on this point. Neither is there any current Federal Court decision touching on this point. Perhaps there may soon be a decision from these Superior Courts on this point.

[21] Here, apart from entering an unconditional appearance, the defendants have filed their Statement of Defence. That would certainly trigger the obiter dicta of Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors*. But it must not be forgotten that the defendants here also relied upon the inherent jurisdiction of this court to strike out the plaintiff's writ of summons and the statement of claim. This is what that makes the present case different from that of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors*. The defendants here are entitled to invoke the inherent jurisdiction of this court in order to end the proceedings forthwith without a trial.

TO THE HEART OF THE MATTER

[22] It is the stand of the defendants that the plaintiff was at the material time holding the rank of ASP. The rank of ASP is the actual substantive rank held by the plaintiff. The plaintiff was, vide the letter dated 21 January 1998 (see exh 'AAM-1' of encl 25), transferred from Bukit Aman, Kuala Lumpur to Taiping, Perak with the acting rank of DSP. This acting rank of DSP was given to the plaintiff merely as an acting rank and nothing else. Regulation 2 of the Public Services Promotion Board Regulations 1986 defines the word 'acting' in this way:

> acting: means where an approval is granted to an officer to exercise full time the duties attaching to a post of a higher grade than his substantive grade within the relevant Scheme of Service of the officer concerned whether with a view to promotion or otherwise;

There is no guarantee that the plaintiff who was acting on the rank of DSP could be confirmed. Unless confirmed, the plaintiff shall otherwise uphold the substantive rank of ASP.

[23] Whether the plaintiff is to be confirmed or not to be confirmed on his acting rank of DSP, it is entirely the management prerogative of the defendants. Regulation 9 of the Public Services Promotion Board Regulations 1986 stipulates as follows:

Principles and procedures of the Promotion Boards	9. In the exercise of its functions, a Promotion Board shall abide by the principles set out in the General Orders or other administrative orders or directives for the time being lawfully issued and in force.

The Promotion Board may shortlist candidates in any promotion exercise and this is stipulated in reg 12 of the Public Services Promotion Board Regulations 1986. The Promotion Board too may, in its discretion, promote the reserved candidates in a promotion exercise within a period of six months from the date of the announcement of the decision of the Promotion Board (see reg 14 of the Public Services Promotion Board Regulations 1986). All candidates in a promotion or acting exercise shall be notified by the Promotion Board of its decision. And the decision of the Promotion Board shall be provisional and is not confirmed until all the appeals in respect of a particular promotion exercise have been determined (see reg 15 of the Public Services Promotion Board Regulations 1986). An Appeal Board after considering the appeal may confirm or vary the decision of the Promotion Board concerned, or may remit the case to the Promotion Board concerned for rehearing and the result of its deliberation shall be duly conveyed to the Appeal Board to enable it to come to a decision on the appeal. In implementing the decision of the Appeal Board, the Promotion Board concerned may alter the effective date of promotion and the order of seniority of the officer concerned provided that it shall not affect the promotion per se of the successful officer. It must be borne in mind that the decision of the Appeal Board shall be final (see reg 22 of the Public Services Promotion Board Regulations 1986).

[24] Regulation 19 of the Public Services Promotion Board Regulations 1986 stipulates that any officer who is eligible for consideration in a promotion or acting exercise and who is aggrieved by the decision of the Promotion Board concerned, may appeal to the Appeal Board. It must be emphasised that the decision of the Appeal Board shall be final. It is part and parcel of my judgment that whether a public service officer can be confirmed or promoted is a non-justifiable issue because it is the sole management prerogatives of both the Promotion Board and the Appeal Board under the Public Services Promotion Board Regulations 1986. In *Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209, the Amalgamated Union of Employees in Government Clerical and Allied Services ('Union') sought for an order of mandamus directing the respondents there to implement the decision of the Public Services Tribunal who has directed the affected members of the Union to be confirmed in their respective positions. The respondents argued that since they believed that the decision of the Public Services Tribunal was wrong, they would not be implementing the decision of the said tribunal. In issuing the order of mandamus, the court held that since the respondents there did not, at any time, make an application for certiorari to quash the decision of the Public Services Tribunal the respondents there were bound to comply with the decision of the said tribunal. The court also held that the Public Services Tribunal had heard and determined the anomaly which was not disputed by the respondents there. The court further held that the decision of the Public Services Tribunal was final, conclusive and binding on all the parties to the anomaly and its decision could not be challenged, appealed against, reviewed, quashed or called in question in any court. But the court noted that the Public Services Tribunal being an inferior tribunal was still subject to judicial review. The respondents there argued that the decision of the Public Services Tribunal was null and void in that the said tribunal had acted in excess of its jurisdiction. The court, however, was of the view that the issues in regard to s 13(g) of the Public Service Tribunal Act 1977 was entirely the management prerogative of

the respondents there. It is ideal, at this juncture, to reproduce s 13(g) of the Public Service Tribunal Act 1977. It is worded in this way:

> 13 The following matters are management prerogative and shall not be raised or made a subject matter of negotiation or reference to the tribunal under this Act by an aggrieved person —
>
> (a) the creation of salary structure or salary scale;
>
> (b) the creation or grading of posts;
>
> (c) regrading or amalgamation of posts;
>
> (d) the creation or grading of schemes of services;
>
> (e) amalgamation, classification or regrading of schemes of service;
>
> (f) amendment or abolition of schemes of service;
>
> (g) the promotion of a public officer from a lower grade to a higher grade;
>
> (h) the transfer of a public officer;
>
> (i) the appointment of any person into the public service;
>
> (j) the determination of a starting salary of a public officer by the relevant appointing authority;
>
> (k) the termination of the service of a public officer by reasons of redundancy or reorganisation; or termination in the service interest or public interest;
>
> (l) the dismissal and reinstatement of a public officer;
>
> (m) the assignment or allocation of duties in the public service;
>
> (n) the evaluation and recognition of qualifications;
>
> (o) the assessment of the performance of a public officer; and
>
> (p) matters relating to pensions.

It must be borne in mind that the Public Service Tribunal Act 1977 was, in due course, repealed by the Public Service Tribunal (Dissolution) Act 2000 (Act 604) with effect from 1 January 2000. But the Public Service Tribunal Act 1977 is still in force when the plaintiff was transferred from Bukit Aman, Kuala Lumpur to Taiping, Perak by way of a letter dated 21 January 1998 (see exh 'AAM-1' of encl 25) and when he was given the rank of acting DSP. When the plaintiff was transferred from Taiping, Perak to Kota Kinabalu, Sabah on 29 September 2000 (see exh 'AAM-4' of encl 25) to his original rank of ASP, the Public Service Tribunal Act 1977 was already repealed. Notwithstanding such repeal, it is my judgment that the management prerogative of the defendants in respect of promotion of a public officer from a lower grade to a higher grade is preserved and maintained. Similarly, the confirmation or non-confirmation of acting on a higher rank by a public officer is equally maintained as the management prerogative of the defendants.

[25] It is a correct assertion to say and I so say that even though the plaintiff was acting on the rank of DSP, that does not mean that he was guaranteed a confirmation or promotion to that rank. The plaintiff is only an officer who may be 'fit to be chosen' and not 'entitled' to be confirmed or promoted. It is now appropriate to refer to the case of *Rasiah Munusamy v Public Services Commission* [1967] AC 348, a decision of the Privy Council with a coram of Lord Morris of Borth-Y-Gest,

Lord Hodson and Lord Wilberforce. Briefly, the facts of that case may be stated as follows. The appellant was previously employed as an immigration officer. The appellant then made an application to the respondent to be appointed and he was later appointed as an assistant passport officer in the External Affairs Service and he was placed on probation for a period of three years. Later, during the probationary period, the respondent found out that the appellant had made a false statement in his application (the appellant wrongly stated that he had passed the school certificate examination) and, because of this the appellant was reverted to his former post. The appellant argued that he was not given the right to be heard. Lord Hodson delivering the judgment of the Board had this to say (see p 360 of the report):

> The letter of appointment is not wholly clear in its terms but their Lordships are of opinion that the appellant was in any event appointed to the rank of assistant passport officer only as a probationer, so that he could be reverted to his substantive rank of immigration officer without the question of reduction of rank arising for consideration notwithstanding the statement in the letter that subject to his work and conduct being satisfactory he would be eligible for confirmation in his appointment at the end of the period. 'Eligible for' is not equivalent to 'entitled to' and means no more than 'fit to be chosen for.
>
> Their Lordships will therefore report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellant should pay the costs of the respondent of the appeal.

[26] Next, I will refer to the case of *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, and the facts may be stated as follows. The applicant joined the University Sains Malaysia as a lecturer in the School of Social Science on 9 September 1975. He was made an associate professor on 1 August 1981. By a letter dated 29 May 1985, the applicant was appointed dean of the School for the period from 1 December 1984 to 31 May 1985 and was thereafter re-appointed for two conservative one year terms ending on 31 May 1989. By a letter dated 3 May 1989, the Vice-Chancellor indicated his decision not to reappoint the applicant. The applicant then applied to the court for leave to apply for an order of certiorari to quash the decision of the vice-chancellor. The court exercised its discretion whether to grant leave by hearing both the applicant and the respondent in open court. In dismissing the application, Edgar Joseph Jr J (as he then was) aptly said (see pp 300–301 of the report):

> Clearly, the applicant was eligible for reappointment as dean and, indeed, there was no dispute on this score. However, the fact that he was eligible as such could, in no way, confer upon him an entitlement to that appointment. Moreover, his appointment as dean could in no way relate to his contract of service with the respondent university. Consequently, his appointment as dean under s 18(3) of the Constitution could not possibly carry with it any traces of security of tenure. There was no question therefore of his rights or interests being affected by the refusal to appoint him dean.
>
> The more difficult question was whether it was arguable that the applicant had a legitimate expectation of being reappointed dean. If so, it would be arguable that he should have been given the opportunity of making representations (see *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at p 170 and *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629).
>
> However, to qualify as an expectation which attracts procedural protection, it must be 'legitimate'. The closest the courts have come to explaining the idea of legitimacy is that the

expectation must be reasonable. The epithet most frequently used by the courts as a substitute for 'legitimate' is 'reasonable' (see *AG of Hong Kong v Ng Yuen* [1983] 2 AC 629 at p 637), although reference has also been made to 'well founded' (*Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at p 439 per Stephen J), 'settled' (*R v Liverpool Corporation; ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 at p 304 per Denning MR), 'natural' (*FAI Insurances Ltd v Winneke* [1982] 151 CLR 342 at p 348 per Gibbs CJ) or 'real' (*Barbaro v Minister for Immigration and Ethnic Affairs* [1982] 46 ALR 123 at p 130 per Smitthers J).

'Reasonableness' connotes that the expectation must be objectively justified. A subjective hope is therefore not enough (see *McInnes v Onslow-Fane* [1978] 1 WLR 1520 at pp 1529–30). However, its use has been discouraged recently by the House of Lords (see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Fraser, Lord Dicplock and Lord Roskill). The chief reason advanced being that some expectations, although they might well be entertained by reasonable persons will not necessarily have consequences to which effect will be given in public law (at pp 408-409 per Lord Diplock). Furthermore, the possibility that there may be some reasonable expectations which are not 'legitimate' has emerged with the extension of the concept of legitimate expectation into areas other than procedural fairness; for example, standing to bring an application for judicial review (see *Re Findlay,* [1985] AC 318, a case on parole policy).

Now, in the area of employment, the concept of legitimate expectation is elusive at least where used in relation to the expectation of promotion (see *Hamblin v Duffy (No 2)* [1981] 37 ALR 297, at p 304). Indeed, it has been held that the decision of a health authority not to appoint to the post of consultant orthopaedic surgeon a candidate recommended by the advisory appointment committee was not justiciable at all and so not susceptible of judicial review (see *R v Trent Regional Health Authority, ex p Jones* [1986] The Times, 19 June 342).

More to the point, the reluctance of courts to interfere in all matters concerning the domestic affairs and internal management of a university stems from their enthusiasm for the jurisdiction of the university visitor (equivalent in this country to that of vice-chancellor) in such matters (see *Patel v University of Bradford Senate* [1978] 1 WLR 1488 at pp 1499–1500). The English courts have continued to assert the exclusivity of the university visitor's jurisdiction (*Glynn v Keele University* [1981] 2 NZLR 619), and even to enlarge it (*Patel v University of Bradford Senate* [1978] 1 WLR 1488).

Thus, in the present case, the question whether the applicant should have been reappointed dean following the expiry of his term, by the vice-chancellor pursuant to the powers conferred by s 18 of the Constitution was exclusively a domestic matter involving academic judgment, to be resolved internally. No economic loss, social stigma, difficulty in securing future employment or dislocation was involved in the vice-chancellor's decision declining to reappoint the applicant dean. In such circumstances, I regarded the applicant as having no more than a pious 'hope' of being reappointed dean; 'nothing was being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges' (see *McInnes v Onslow-Fane* [1978] 1 WLR 1520 at pp 1529–30) and also, *Paterson v Dunedin City Council* [1981] 2 NZLR 619 where the width of the discretion defeated any legitimate expectation).

Accordingly, it was manifestly clear that the issues arising upon this application were not justiciable and so this court had no jurisdiction to grant the relief sought therein.

[27] This would be followed by the case of *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 MLJ 107. In that case, the applicant was appointed as a senior manager subject to a probationary period of six months. Approximately eight months later, due to the applicant's unsatisfactory performance,

his appointment was terminated. The applicant filed an application seeking for orders of certiorari and mandamus. In dismissing the application, Faiza Tamby Chik J, had this to say (see p 122 of the report):

> It must be noted that the applicant's reliance on *Khaliah bte Abbas*'s case is misplaced. The Court of Appeal in that case did not consider the earlier Federal Court decision of *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 at p 321 which confirmed the position of probationers, as set out in the Indian Supreme Court case of *Express Newspapers Ltd v Labour Court & Anor* AIR 1964 SC 806, where Das Gupta J held:
>
> > This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired — except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.
>
> Therefore in the instant case at the end of the applicant's probationary period, it was open to the second respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the second respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily. If it were otherwise, there would be no distinction between probationary employment and permanent employment.

[28] I must generously apply the philosophy of the management prerogative on the part of the employer towards his employee in respect of confirmation of appointment or continuation of service or re-appointment as enunciated in the above mentioned cases. The plaintiff, in the instant case, who was on an acting rank of DSP cannot convince this court that he should be promoted to the rank of DSP. It is the management prerogative of the defendants to decide whether to confirm him on the rank of DSP or otherwise.

[29] From the pleadings, the plaintiff admitted that he faced two charges in the disciplinary action and he was found guilty for both the charges and was sentenced to a fine of two days pay and given a warning. Both the charges were in respect of events that happened during the plaintiff's tenure of service in Taiping, Perak. Since the plaintiff was penalised for disciplinary actions, he was not eligible to be promoted for a certain duration of time. Paragraphs 4(c), 4(d) and 4(e) of the 'Surat Pekeliling Perkhidmatan Bil 4 Tahun 1990' are relevant and they certainly apply to the plaintiff. These paragraphs are worded in this way:

> 4. Adalah diputuskan bahawa setiap urusan kenaikan pangkat yang akan dibuat mengikut peraturan yang ditetapkan seperti di perenggan 2 di atas hendaklah tertakluk kepada peraturan berikut:

(c) Pegawai yang dikenakan hukuman tatatertib adalah tidak layak dinaikkan pangkat mengikut tempoh dan urusan seperti di bawah:

Hukuman	Tempoh tidak layak dinaikkan pangkat/ urusan kenaikan pangkat
Amaran	6 bulan atau 1 urusan, mana yang terdahulu
Denda	12 bulan atau 1 urusan, mana yang terdahulu

(d) Bagi pegawai atau kakitangan yang dikenakan lebih daripada satu hukuman tatatertib, hasil campuran tempoh atau urusan kenaikan pangkat ini hendaklah tidak melebihi dari tempoh atau urusan kenaikan pangkat seseorang pegawai yang dikenakan hukuman yang lebih berat; dan

(e) Tempoh kuatkuasa pengenepian kenaikan pangkat ialah mulai tarikh hukuman tatatertib dijatuhkan.

Now, exhs 'AAM-10' and 'AAM-11' of encl 25 clearly show that the letter dated 11 June 2002 informing the plaintiff of the sentences imposed on him was served and received by the plaintiff on 21 June 2002. And by applying paras 4(c), 4(d) and 4(e) of the 'Surat Pekeliling Perkhidmatan Bil 4 Tahun 1990' as alluded to above, it meant that the plaintiff was not eligible for promotion or confirmation to the rank of acting DSP for 12 months plus 6 months from the date of service — which would be on 21 June 2002. It follows therefore that the plaintiff is actually not qualified to be confirmed to the acting rank of Deputy Superintendent of Police (DSP) or to be promoted to that rank until the lapse of 18 months and that would be, calculation wise, until 21 December 2003.

[30] The issue of transfer from one district to another or from one area to another is also the management prerogative of the defendants. It is now apt to refer to the judgment of Salleh Abas FJ (as he then was) in the case of *Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68. There his Lordship succinctly said at p 69 of the report:

> The law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by Parliament. So far Parliament has not yet made any law on the subject of civil service except the Pensions Ordinance and Parliamentary Service Act (No 12 of 1963). These two Acts are irrelevant in the present appeal. The Constitution prescribes no limit on the scope and extent of the pleasure of the Yang di-Pertuan Agong but when power to dismiss an employee or to reduce him in rank is to be exercised, the Constitution prescribes procedural restrictions as to the manner and by whom this power is exercisable. Thus the pleasure of the Yang di-Pertuan Agong not only applies to tenure of office of an employee but also extends to a multitude of subject matters such as appointments, promotions, transfers, salaries, leaves and other benefits. These are all being regulated by civil service rules known as Perintah-Perintah Am made by the Yang di-Pertuan Agong under cl 2 and art 132 and also various circulars, instructions issued from time to time by appropriate authorities in the Government.

Continuing at p 70 of the report, his Lordship said:

> Regarding the allegation of reduction in rank the respondent swore an affidavit saying that since 1973 he became a supervisor of the school and that in that capacity in the absence of the Headmaster and the Deputy Headmaster his duties included administration and overall charge of teachers of the school. His transfer to Chung Hwa School in Jerteh, he claims, albeit retaining Category B1 teacher deprives him of the appointment of supervisor of the school. In our view the work of a supervisor does not involve any extra remuneration payable to him although he is required to do some administrative work in the absence of the administrative head and deputy head. Although he and many others may feel that taking him away from the supervisory capacity is a demotion, in our view this act does not seem to be reduction in rank within the meaning of art 135 of the Constitution. His transfer to Chung Hwa School does not reduce his rank below that of a category B1 teacher which he continues to retain, nor would he receive less remuneration. According to affidavit of Encik Abdul Halim Shah which was agreed to by the respondent, he was, on joining the Government service 'accordingly directable, deployable and transferable to perform teaching, administrative and other duties …'. We therefore find nothing in this allegation which merits holding a trial.

[31] Reference to the case of *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339 (CA).

[32] There is a book written by CP Mills entitled *Industrial Disputes Law in Malaysia*. At p 75 of the book, the learned author wrote this:

> It is well settled that, normally, the right to transfer an employee from one place to another is the prerogative of the management and an employer is entitled to require his employee to work anywhere.

The decision making process of the defendants is beyond reproach. Being transferred from Bukit Aman, Kuala Lumpur to Taiping, Perak and from Taiping, Perak to Kota Kinabalu, Sabah is part and parcel of the management prerogative of the defendants. At p 244 of *Alfred Avins Employees Misconduct* (2nd Ed), the following recitals appear:

> The liability to be transferred from one place to another by the employer is an implied condition of service of every employee … it can only be taken away or curtailed or regulated in express terms ….. Therefore, unless the terms of employment provide otherwise, the company has the right to transfer and it is really for the employee to show that there was a contracting out of this position.

It is the management prerogative of the defendants to transfer the plaintiff anywhere within Malaysia and to any part of Malaysia. The plaintiff has no cause to complain.

[33] At the bar, I am told that the plaintiff has since resigned from the police force. He is now, I am told, practising law. Hopefully, he will succeed in his new chosen profession.

[34] The upshot of it all is this. I grant an order in terms of the defendants' application in encl 27. The plaintiff's writ of summons and the statement of claim are hereby struck out with costs.

Plaintiff's writ of summons and statement of claim struck out with costs.

Reported by Sally Kee